of substantially similar entities." *Id.* at 298. "[W]hen the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *Id.* at 299. In *Tracy*, the allegedly competing entities provided different products. The in-state entities (regulated, domestic utility companies) provided natural gas bundled with services and protections required by statute. *Id.* at pp.297-98. The out-of-state entities (sellers of natural gas) provided gas which was not "bundled" with any such services or protections. *Id.* The out-of-state sellers did not compete with the public utilities, also known as local distribution companies (or "LDCs"), in the LDC's core market of small, captive users (typically residential users) who needed a "bundled" product. *Id.* at 301. There was, however, "a further market where the sellers of bundled and unbundled products apparently do compete and may compete further." *Id.* at 303. This market was a non-captive market made up primarily of large end-users of natural gas, such as General Motors. *Id.* at 303, 307.

Despite the existence of competition between the in-state utilities and the out-of-state sellers in the non-captive market, this Court held that the respective entities were not "similarly situated" for constitutional purposes. *Id.* at 304. In so doing, this Court attached "greater weight" to the captive market and treated the entities as dissimilar. *Id.* Otherwise stated, despite the fact that the in-state regulated utilities and the out-of-state sellers competed with each other in a given market, *Tracy* nevertheless held that the respective entities were not "similarly situated" for constitutional purposes, and thus found no discrimination.

The foregoing review of *Tracy* fully debunks petitioners' assertions here that *Tracy* established an "actual or prospective competition" test for determining whether in-state and out-of-state actors are similarly situated for constitutional purposes. If *Tracy* had actually established the test which petitioners advocate, the result in *Tracy* would have been precisely the opposite. *Tracy* reveals that "actual or prospective competition" between in-state and out-of-state actors is a necessary but not sufficient condition which must exist in order for such entities to be considered "similarly situated."

b. The Sixth Circuit Properly Applied *Tracy*.

The Sixth Circuit's ruling below is entirely consistent with *Tracy*. The supposedly disfavored entities are the petitioners and other out-of-state retail stores which sell, among other things, prescription eyewear. The supposedly favored entities are Tennessee-licensed doctors of optometry who provide health care services to their patients and who, as part of their practice, are allowed to make prescription eyeglasses and contact lenses available to their patients.

These optometrists are engaged primarily in the practice of health care, i.e., the practice of optometry, a learned medical discipline. *LensCrafters*, 33 S.W.3d at 778. They operate health care practices, not retail stores. Petitioners do not compete with Tennessee-licensed optometrists in the marketing or delivery of health care services. Even to the extent that petitioners claim to compete with such health care professionals in the sale of ophthalmic materials, because optometrists are "primarily" health care providers, under *Tracy*, greater weight

should be given to this health care market in which there is no competition.[2] As a result, the supposedly favored and disfavored entities are not similarly situated for purposes of the Commerce Clause. The Sixth Circuit's decision in this regard does not conflict with, and is in fact supported by, *Tracy*.

c. There Is No Split Among the Circuits With Regard to *Tracy*.

Petitioners also seek review of this case on the basis that the Sixth Circuit's decision below "places it on one side of a broadening divide among the circuits." Petition, p.15. In petitioners' view, the Sixth Circuit has aligned itself with the Fifth Circuit's decisions in *Ford Motor Co. v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001), and *International Truck & Engine Corp. v. Bray*, 372 F.3d 717 (5th Cir. 2004), and the Second Circuit's decision in *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003), in holding that in-state and out-of-state actors may not be "similarly situated" even where competition may exist between them in some market. Petition, p.18. Petitioners further claim that on

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[2] Petitioners claim that Tennessee optometrists wear two hats: one as a health care provider and another as a market participant in the retail sale of eyewear. Petition, p.13. It would be more accurate, however, to say that Tennessee optometrists wear but one hat, and it is a different hat from that worn by petitioners. Tennessee-licensed optometrists are health care providers who may offer prescription eyewear to their patients. If an optometrist ceases to be "engaged primarily in health care delivery" (*LensCrafters*, 33 S.W.3d at 778), and instead becomes, like LensCrafters, "engaged primarily in the business of selling and dispensing ophthalmic lenses and frames" (*Id.*), then the optometrist becomes just another in-state or out-of-state retailer and must comply with Section 63-8-113(c)(6).

the other side of this "divide" exists the First Circuit's decision in *National Revenue Corp. v. Violet*, 807 F.2d 285 (1st Cir. 1986), the Seventh Circuit's decision in *Government Suppliers' Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1933), and the Eighth Circuit's decision in *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993), all of whom allegedly embrace the "*Tracy* test" for determining whether supposedly favored and disfavored entities are "similarly situated." There is, however, no so such divide.

Respondents agree that the Sixth Circuit's decision here is wholly consistent with the decisions of the Fifth Circuit and Second Circuit, all of which were decided after *Tracy*. Respondents disagree, however, that the Sixth Circuit's decision is inconsistent with the cited decisions of the First, Seventh, and Eighth Circuits.

At the outset, it should be noted that the decisions of the First, Seventh and Eighth Circuits upon which petitioners rely all pre-date *Tracy*. Thus, no argument can be made that the federal circuits are in conflict in applying the principles articulated in *Tracy*. An analysis of the three decisions which petitioners cite also reveals that there is also no conflict with regard to the factors to be considered in determining whether in-state and out-of-state entities are similarly situated.

In *National Revenue Corporation v. Violet*, the First Circuit struck down a Rhode Island statute which, in effect, foreclosed any out-of-state debt collectors from seeking to collect debts from Rhode Island citizens. *National Revenue*, 807 F.2d at 289. The court did so on the basis that the law discriminated against out-of-state

interests and the state did not rebut such discrimination by showing a legitimate local purpose which could not be served as well by non-discriminatory means. *Id.* at 290. No party raised, and the court did not address, the question of whether the supposedly favored in-state interests and the supposedly disfavored out-of-state interests were similarly situated. In fact, the words "similarly situated" do not even appear in the court's opinion. Petitioners cannot establish the existence of a split in the circuits by reference to a case which did not consider or address the issue as to which a conflict among the circuits allegedly exists.

The second case upon which petitioners rely to demonstrate the existence of a "divide" between the circuits, *Government Suppliers v. Bayh*, fares no better. In that case, the Seventh Circuit struck down portions of an Indiana statute which regulated the disposal of out-of-state waste in Indiana. With the exception of a passing reference that the district court found that the statute "applied identically to similarly situated waste haulers" (*Government Suppliers*, 975 F.2d at 1273), there is no reference to, discussion of, or decision regarding whether the supposedly favored and disfavored entities were or were not similarly situated anywhere in the Court's 16-page opinion. There certainly is no support for petitioners' conclusory statement that "the court recognized that the different trucking businesses were competitors, and thus similarly situated." Petition, p.17. Nothing in the Seventh Circuit's opinion in *Government Suppliers* is inconsistent with the Sixth Circuit's decision below, with the Fifth

Circuit's decision in *Ford*, or the Second Circuit's decision in *Brown & Williamson*.[3]

The third and final decision upon which petitioners base their claim that there exists a split of authority among the circuits is the Eighth Circuit's decision in *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993). Once again, however, the issue of whether the in-state and out-of-state actors were "similarly situated" was not addressed. Rather, the court determined that the effect of the ordinance at issue was to forbid the transport of waste out of the county, and struck down the statute as discriminatory. There is no analysis in the opinion as to whether the supposedly favored or disfavored waste haulers were or were not similarly situated. Nothing in *Waste Systems Corp.* evidences a "divide" in the circuits with regard to any pre- or post-*Tracy* test concerning similarly situated entities.

Accordingly, there is no divide between the circuits which this Court needs to bridge.

2. The decision below did not rob *Pike* of its utility, nor does it add to a split among the Circuits with regard to *Pike*.

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), this Court held that "[w]here a statute regulates even-handedly to effectuate a legitimate local public

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[3] In addition, the continued vitality of *Government Suppliers* is called into question by *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), which upheld waste-disposal regulations similar to those at issue in *Government Suppliers*.

interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Below, the Sixth Circuit affirmed the district court's rejection of petitioners' claim that, even if Section 63-8-113(c)(6) regulates evenhandedly, the burdens imposed on interstate commerce clearly exceeded the local benefits of the statute. Petition, p.14a. In so doing, the Sixth Circuit adopted the district court's view that petitioners' claim fails because any burden imposed by the statute was imposed on commerce generally. C.A.J.A. 148. There was no burden imposed solely on interstate commerce. *Id.* This ruling is consistent with the view expressed repeatedly by the Second Circuit that an "excessive burden in relation to putative benefits . . . is a burden on interstate commerce that is different from the burden imposed on intrastate commerce." *Brown & Williamson*, 320 F.3d at 209. "To run afoul of the *Pike* standard, the statute must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Nat'l Elec. Mfr's Assn. v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001).

Petitioners claim that the Sixth Circuit's application of *Pike* "robs the *Pike* test of its utility" and "adds to a Circuit split regarding which burdens on interstate commerce are relevant to that test." Petition, p.28. Both claims lack merit.

a. There Is No Split Among the Circuits.

Petitioners claim that there exists a split in the federal circuits concerning *Pike* balancing which justifies this Court's review of this case. According to the petitioners, the

circuits are split as to the question of what burdens upon interstate commerce are relevant under *Pike*. Petition, p.28. Petitioners assert that, like the Sixth Circuit below, the Second, Third, Fifth and Seventh Circuits have held that only "burdens that fall more heavily on interstate commerce than in-state commerce are cognizable under *Pike*." *Id.* at p.29. By contrast, petitioners claim the Eighth and Tenth Circuits hold "that all burdens on interstate commerce imposed by the challenged state law are relevant to the *Pike* balancing test." *Id.* at p.28. Further analysis of the issue, however, demonstrates that any alleged split is linguistic, not substantive.

Petitioners claim that the Eighth and Tenth Circuits are split from the other circuits. The Tenth Circuit case upon which petitioners rely is *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992). But in a more recent case, the Tenth Circuit expressly embraced the principles articulated by the Second Circuit in applying *Pike*. In *V-1 Oil Company v. Utah State Department of Public Safety*, 131 F.3d 1415, 1425 (10th Cir. 1997), the Tenth Circuit – quoting with approval the Second Circuit's decision in *New York State Travelers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994) – held that the "'incidental burdens' of the *Pike* inquiry 'are the burdens on interstate commerce that ***exceed*** the burdens on intrastate commerce." (emphasis added) The Tenth Circuit is not split from the Second Circuit with regard to *Pike* balancing but rather is in accord with the Second Circuit. Likewise, there is no tension between the Tenth Circuit's approach to *Pike* balancing in *V-1 Oil* and the Sixth Circuit's decision below. In fact, in *V-1 Oil*, the Tenth Circuit ultimately concluded, with regard to the licensing fees at issue, that "there is no evidence that the burdens upon interstate commerce are

anything but incidental, and certainly are not 'clearly excessive' under *Pike*." *V-1 Oil*, 131 F.3d at 1427.

The Eighth Circuit decision, *R&M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731 (8th Cir. 2002), upon which petitioners reply to evidence a split, is likewise easily reconciled with the decisions of the other circuits. In *R&M*, the plaintiff challenged a Missouri statute which required bulk sellers of propane gas at retail to maintain and operate a storage facility in Missouri having a capacity of at least 18,000 gallons. *R&M*, 307 F.3d at 733. The Eighth Circuit agreed with the district court that the statute provided "relatively little local benefit," yet imposed an initial investment expense of $35,000 to $60,000 upon sellers. *Id.* at 736. The Court found the burden of this expense to be significant, and relying on *Pike*, found the statute unconstitutional. *Id.*

The Eighth Circuit's application of *Pike* in *R&M* does not show any disharmony with the other circuits. The burden imposed in *R&M* (the $35,000 to $60,000 in initial investment costs) was an additional burden to be borne by interstate propane distributors only. Distributors which operated only in Missouri had already invested in in-state storage facilities and were left unaffected by the statute. Thus, the Eighth Circuit's holding is perfectly consistent with the Second Circuit's position that an excessive burden under *Pike* is one that is "different from" the burden imposed on intrastate commerce. See *Brown & Williamson*, 320 F.3d at 209.

Petitioners assert that a conflict exists on the basis of the *R&M* court's statement that it must look at the "cumulative effects of the Missouri statute on all propane distributors." Petition, p.28. The "cumulative effects" to which

the court referred, however, have nothing to do with the burden imposed upon the plaintiff, R&M. Rather, "cumulative effects" refers to the consideration of the effect of not only the statute itself, but also consideration of "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many, or every, state adopted similar legislation." *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069 (8th Cir. 2000). *R&M* expressly cited to *U&I Sanitation* for this proposition of law. *R&M*, 307 F.3d at 736. In context, the "cumulative effects" language in *R&M* is unrelated to the alleged division among the circuits with respect to *Pike* balancing.

In the final analysis, any disparity which exists in the decisions to which petitioners refer is a disparity in expression, not in meaning. This is so because there is no real difference between the "burden imposed upon interstate commerce" (which petitioners claim is the standard used by the Eighth and Tenth Circuits) and the "additional burden imposed upon interstate commerce" (which petitioners claim is the standard used by the Second, Third, Fifth, Sixth and Seventh Circuits). States are free to regulate or burden commerce which is purely intrastate. See *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2419, 2423 (2005). Such regulation is not precluded by the Commerce Clause. The Commerce Clause is implicated only when a state regulation burdens interstate commerce. Whether a court refers to this burden as the "burden on interstate commerce" or the "additional burden on interstate commerce" is immaterial. In substance, the burden being considered is the same.

b. The Sixth Circuit Did Not Rob *Pike* of Its Utility.

Petitioners claim that the Sixth Circuit's application of *Pike* "robs [it] of its utility." Petition, p.30. According to petitioners, " . . . to hold that the only burdens that count under *Pike* are those that result from discriminatory treatment of firms doing business in interstate commerce is to say that *Pike* applies only in cases where a statute has already been struck down as impermissibly discriminatory. . . ." *Id.* The Sixth Circuit did not hold below, that the only burdens that count under *Pike* are those that result from discriminatory treatment of firms doing business in interstate commerce. That Court recognized that *Pike* applies where a statute regulates even-handedly, i.e., where there is no discriminatory treatment.[4] Petition, p.13a. If the Court below had found discriminatory treatment, it would likely never have reached the *Pike* analysis. Petitioners' criticism of the Sixth Circuit's opinion in this regard is clearly unfounded.

Further, the Sixth Circuit's recognition below that the incidental burden relevant under *Pike* is the burden placed upon interstate commerce which is different from and in addition to that placed on commerce generally in no way undermines *Pike*. A non-discriminatory statute which regulates even-handedly may nevertheless impose an incidental burden upon interstate commerce. The mere

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[4] *Pike* also has utility in a case, like the instant case, where a petitioner alleges that disparate treatment constitutes discrimination, but the objects of the disparate treatment are not similarly situated. A state regulation which treats dissimilar in-state and out-of-state actors disparately must nonetheless pass muster under *Pike*. Petitioners cannot claim that the Sixth Circuit's ruling below robbed *Pike* of utility in this respect.

fact that a statute places an incidental burden upon interstate commerce does not render the statute discriminatory.

In *Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 473 (1981), for example, his Court wrote that "Even granting that the out-of-state plastics industry is burdened relatively more heavily then the Minnesota pulpwood industry, we find that this burden is not 'clearly excessive' in light of the substantial state interest." In petitioners' view of things, such a result should not be possible because a heavier burden on interstate commerce equals discrimination. This Court also rejected this view in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978), where it noted that "the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Likewise, in *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 429 (1963), this Court held that a statute which simply burdens commerce in some respect does not necessarily have a discriminatory effect. This Court has, thus, repeatedly recognized that even a non-discriminatory statute may burden interstate commerce more heavily than intrastate commerce. Petitioner's position that a statute which burdens interstate commerce more heavily than intrastate commerce is necessarily discriminatory has already been firmly rejected by the Court.

The petitioners also fail to appreciate that the line which divides a statute which impermissibly discriminates in effect against interstate commerce from one which regulates even-handedly but imposes an incidental burden upon interstate commerce is not always clear. In *Brown-Forman Distillers Corporation v. New York State Liquor*

Authority, 476 U.S. 573, 579 (1986), this Court recognized that "there is no clear line separating the category of state regulations that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." See also *Tracy*, 519 U.S. at 299. In contrast to *Brown-Forman*, the petitioners offer a bright-line rule which provides that any statute imposing a burden upon interstate commerce which exceeds that placed upon intrastate commerce is subject to a per se rule of invalidity and is not properly suited to *Pike* balancing. This Court's jurisprudence has already rejected such a bright-line rule. There is no need to do so again here.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 05-702

In The
Supreme Court of the United States

LENSCRAFTERS, INC.; U.S. VISION; COLE VISION CORPORATION; NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS,

Petitioners,

v.

KENNETH S. ROBINSON, in his official capacity as the Commissioner of the Tennessee Department Of Health; JERRY A. RICHT, O.D.; SCOTT L. SPIVEY, O.D.; TERRY L. HENDRICKSON, O.D.; BRIAN BROWDER; JEFF FOSTER, O.D.; EDDIE ABERNATHY, O.D.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY BRIEF FOR PETITIONERS

A. Respondents' Own Arguments Confirm That The Lower Courts Are In Conflict On *Tracy* And That This Court's Review Is Needed

Respondents attempt to defeat the need for this Court's review by claiming that there is no split among the lower courts on the meaning of the "similarly situated" holding in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), and that the court below correctly applied *Tracy*. Both claims are proven wrong by respondents' own arguments.

1. Respondents err in contending that, notwithstanding *Tracy*, entities that are in "actual or prospective competition" with each other are not necessarily "similarly situated" for purposes of Commerce Clause analysis. And they are wrong that the Sixth Circuit ruling below to that effect is not in conflict with lower courts on the issue.[1]

First, respondents completely ignore the direct conflict between the Sixth Circuit and the rulings of the appellate courts of two States. As demonstrated in the petition (Pet. 17-18 n.5), the Supreme Court of New Hampshire and the Court of Appeal of California have squarely faced situations that required a determination whether entities were "similarly situated" under the Commerce Clause, and in both instances those courts determined that the "actual or prospective competition" test was sufficient (as petitioners maintain), not just necessary (as respondents now claim, Br. in Opp. 9), to meet the requirement of *Tracy*. *See Smith v. New Hampshire Dep't of Rev. Admin.*, 813 A.2d 372, 378 (N.H. 2002) (*Tracy* requires proof that "products from out-of-state non-banks were similarly situated to products from New Hampshire banks, in that

[1] Respondents introduce their argument by reliance on *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), but that opinion addressed Due Process and Equal Protection arguments under a rational relationship standard and provided no view whatsoever on any Commerce Clause issue.

they competed against one another in the same market"), *cert. denied*, 538 U.S. 1025 (2003); *Jordan v. California Department of Motor Vehicles*, 75 Cal. App. 4th 449, 462 (1999) ("For used California-certified vehicles and used federally certified vehicles to constitute different products that are not similarly situated for commerce clause purposes, they must have different markets and not compete with each other.").

Second, respondents attempt to discount the opinions of the First, Seventh, and Eighth Circuits that conflict with the Sixth Circuit because those opinions pre-date *Tracy* and do not use the "similarly situated" terminology in their analyses. *See* Br. in Opp. 11-13. But *Tracy* made clear that its "similarly situated" analysis merely stated explicitly what had been implicit even in earlier case law, even if it had not used the same terminology. *Tracy*, 519 U.S. at 298 ("any notion of discrimination assumes a comparison of substantially similar entities" but this "central assumption" had "more often than not itself remained dormant in this Court's opinions") (footnote omitted).

Therefore, it is of no consequence that those circuit decisions pre-date *Tracy* and are not couched in the same terms as *Tracy*. Those cases found discrimination that violated the Commerce Clause. Such a finding, as *Tracy* makes clear, necessarily "assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298. *See National Revenue Corp. v. Violet*, 807 F.2d 285, 289-290 (1st Cir. 1986) (finding discrimination in violation of the Commerce Clause); *Government Suppliers' Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267, 1276-1277 (7th Cir. 1992) (same), *cert. denied*, 506 U.S. 1053 (1993); and *Waste Systems Corp. v. County of Marin*, 985 F.2d 1381, 1386-1388 (8th Cir. 1993) (same). The finding of discrimination in each case rested on differential treatment of entities engaged in actual or prospective competition. Unlike the Sixth Circuit here, those cases did not allow any superficial distinctions between the competing businesses to undermine that discrimination finding. If the instant case had been litigated in any of those circuits, discrimination would have

been found based on the differential treatment of the entities because they are direct competitors.

The Sixth Circuit decision conflicts most starkly with that of the First Circuit in *National Revenue*. In *National Revenue*, the First Circuit found that a Rhode Island law that defined debt collection as the practice of law discriminated against out-of-state commercial debt collection companies. Unlike the Sixth Circuit here, the First Circuit did not find that the entities were not similarly situated merely because of superficial differences between them, including that attorneys have professional duties to clients that debt collection agencies do not. Rather, because the entities potentially competed in the same market for the same customers, the differential treatment of the similarly situated entities constituted discrimination and the First Circuit put the State to its proof to establish a justification for the evident discrimination. The court ultimately found that justification lacking.[2]

If the First Circuit had decided the instant case, it would have treated the in-state optometrists who sell eyewear at retail as similarly situated to the out-of-state retail eyewear businesses who compete against them, and who prospectively would compete more if the challenged state law were removed. Having so found, the discrimination against interstate commerce would be evident, and the State would have been required to justify it.

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[2] There is nothing to indicate that the First Circuit's decision would be different after *Tracy*. In its recent decision in *Walgreen Co. v. Rullan*, 405 F.3d 50, 59 (1st Cir. 2005), *cert. denied*, No. 05-585 (Jan. 9, 2006), the First Circuit followed *National Revenue* and declared a Puerto Rican law invalid under the Commerce Clause because it "favors the largely local group of established pharmacies over similarly-situated out-of-Commonwealth pharmacies seeking to open new stores." The court held that the contention that the law "treats all newcomers equally" was insufficient to eliminate the discrimination because any distinction between newcomers and established pharmacies with which they sought to compete was irrelevant to the Commerce Clause analysis. *Id.* at 58.

2. In their effort to avoid further review in this case, respondents premise their arguments on a misreading of *Tracy*.

Tracy involved a challenge to a state tax law that gave favorable tax treatment to local gas companies, as opposed to certain out-of-state gas companies. The in-state companies distributed natural gas pursuant to state regulations that they "bundle" that service with guarantees that, *inter alia*, they would serve all members of the public, charge only a regulated just and reasonable rate and, for residential customers, provide a backup supply and a degree of continued service to low-income non-paying customers. The Court ruled that the out-of-state natural gas marketers that sold gas free of those state regulatory requirements to larger, nonresidential customers were not similarly situated because, even if the challenged tax preference were removed, those marketers still would not and could not compete in the local distributors' "core market of small, captive users typified by residential consumers who want and need the bundled product." *Tracy*, 519 U.S. at 301.

Respondents focus on the fact that the *Tracy* Court ruled that a possibility of competition in a different, noncaptive gas market (where the record "reveal[ed] virtually nothing about the details of that competitive market," *id.* at 302) did not alter the initial finding that the gas sellers were not similarly situated. In doing so, however, respondents disregard the fact that this part of *Tracy*'s holding still was related to the scope of *competition* between the entities, *see id.* at 310, and not to the sort of superficial distinction between the competing businesses on which the Sixth Circuit relied.

Respondents also ignore the fact that *Tracy* relied heavily on Congress's exercise of its constitutional authority, through the National Gas Act, to "altogether exempt[] state regulation of retail sales of natural gas (including in-state sales to large industrial customers) from the strictures of the dormant Commerce Clause." *Id.* at 304. The Court analyzed, in detail, the 50 years of unbroken recognition by Congress of state authority over

intrastate natural gas and ruled that it was for Congress, not the Court, "to strike the balance between the needs of the competitive and captive markets" in the natural gas industry in light of the past congressional action. *Ibid.* The instant case does not present any comparable scenario of a vital, congressionally sanctioned noncompetitive market. To the contrary, the Federal Trade Commission has found that statutes such as the one challenged here are harmful to consumers and are not justified by any alleged state interest. *See* Pet. 22-23; Brief of National Optometric Association Supp. Pet. 8-11 (emphasizing FTC's findings of harm to consumers as well as the value to minority optometrists of being able to break into the profession through leasing arrangements with out-of-state retail eyewear businesses).[3]

Respondents never articulate plainly what *Tracy* requires in their view. Their vague interpretation gives courts free rein to conflate the justification and nondiscriminatory alternative prongs of the Commerce Clause test with the discrimination prong, thereby failing to require States to meet the constitutional standard for differential treatment of in-state and out-of-state entities. *See* Pet. 20-23 (discussing circuit split on issue).

3. Respondents also premise their arguments on a misreading of the state statute that is directly contrary to the definitive interpretation of the statute by the Tennessee Supreme Court that was ruled on by the Sixth Circuit.

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[3] There is no plausible threat to any health care market if petitioners prevail on the merits of their challenge in the instant case. One of the nondiscriminatory alternatives readily available to the state legislature that petitioners discussed below would be to make it unlawful for any entity to sell eyewear at the same location where eye examinations are provided. This would be fully consistent with Tennessee law, which does not require optometrists to sell eyewear, let alone to do so where they provide eye examinations. To the contrary, the Tennessee Supreme Court unequivocally held that the sale of eyewear is *not* the provision of healthcare. Pet. App. 101a n.8.

In an attempt to manufacture equality of treatment between in-state and out-of-state competitors, respondents claim (Br. in Opp. 3-5, 9-10 & n.2) that some in-state optometrists who sell eyewear at the same location where they provide eye examinations are subject to the statute's restriction. Respondents erroneously state that the statutory restriction applies to optometrists who sell enough eyewear that they are engaged "primarily" in the business of selling lenses and frames, rather than "primarily" in the delivery of health care.[4] Of course, they provide no explanation of how their novel line-drawing could realistically be applied, especially where the comparative volume of retail sales and health care services by a particular optometrist fluctuates regularly. In any event, their new interpretation (which has never been enforced by respondents) cannot be squared with the true scope of the state law.

The statute at issue in this case makes it unlawful for a Tennessee optometrist to "[p]ractice * * * optometry in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale." Tenn. Code Ann. § 63-8-113(c)(6). The Tennessee Supreme Court's interpretation of the statute, on certified question in this case, reads the prohibition to apply only to "non-health care profession" commercial entities. Pet. App. 102a. The court made clear that the prohibition does not apply to practicing in conjunction with other health care professionals (regardless of whether an optometrist "primarily" sells eyewear or delivers health care). The statute "allows optometrists to practice in professional associations with other licensed health care professionals who are not only in the practice of health care delivery but who also sell ophthalmic products." *Ibid.*

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[4] Respondents borrow language from a different statutory provision, which addresses optometrists working as employees of nonprofessionals. Petitioners do not seek to hire optometrists as employees and do not challenge the distinct state law provision that prohibits employment of optometrists by entities "not engaged primarily in health care delivery." Tenn. Code Ann. § 63-8-113(c)(2).

Moreover, the state statute would still discriminate in violation of the Commerce Clause even if optometrists who "primarily" sell eyewear could not provide eye examinations at the same location where the eyewear is sold. That is because the many optometrists who are "primarily" engaged in the delivery of health could still do so under the protection of the state statute. *See* Pet. App. 35a (the percentage of optometrists' income that comes from retail sales of eyewear ranges from 40 to 60%). The precise level of competition is unrelated to the finding of whether the entities are similarly situated. *See Bacchus Imports v. Dias*, 468 U.S. 263, 269 n.10 (1984) (in order for products not to be similarly situated, there would have to be a finding of "no competition whatsoever"); Pet. 14-15.

4. Respondents do not dispute the conflict demonstrated in the petition (Pet. 24-26) between the Sixth Circuit decision below and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and *Granholm v. Heald*, 125 S. Ct. 1885 (2005). Respondents do not defend the Sixth Circuit's reliance on hypothetical out-of-state optometrists in light of those cases. In addition, although respondents suggest (Br. in Opp. 1) that there were some in-state jewelry and department stores where optometrists had practiced prior to 1967, which are subject to the restriction, they ignore the grandfather clause that was included in the initial enactment of the legislation to protect the jobs of those in-state optometrists (*see* Tenn. Code Ann. § 63-8-113(c)(6)). They also do not counter the fact that, under *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391 (1994), and the precedent of other circuits, a law is "no less discriminatory because in-state" businesses "are also covered by the prohibition." *See* Pet. 26-27 & n.10.

The need remains for this Court to resolve the conflict surrounding the application of the "similarly situated" test and discrimination analysis under the Commerce Clause in the lower courts. The misapplication of that analysis by the lower courts has created uncertainty and has resulted in the protection of in-state traditional retail businesses

from innovative out-of-state competition, which raises concerns that go to the heart of the Commerce Clause.

B. Respondents' Misstatements Of The Record Reinforce The Need For Review

Respondents' claim that the record in this case demonstrates a need for the challenged state statute is irrelevant and inaccurate. It is irrelevant because the courts below never reached the issue whether the State could justify the discriminatory statute or whether it was adequately tailored. They pretermitted that inquiry by the erroneous summary judgment ruling that out-of-state retail eyewear businesses are not similarly situated to in-state optometrist-owned retail eyewear businesses.

More to the point, their claim is inaccurate because the record does not demonstrate that the out-of-state retail eyewear businesses engage in sales conduct that is different from in-state optometrist-owned retail eyewear businesses. Petitioners filed affidavits challenging each and every so-called impropriety relied upon by respondents. Furthermore, the affidavits and the evidence that were before the court established, for example, that Tennessee optometrists who sell eyewear can, and do, hire lay persons to manage the retail eyewear sales part of their operations, provide bonuses to their employees for selling more expensive eyewear and increasing their profits, and rely on a variety of subtle and not-so-subtle sales techniques to convince patients to buy high-priced eyewear from that optometrist's retail inventory. Pet. App. 36a. Thus, to the extent state regulation of such conduct is warranted, there is no basis for discriminatory regulation, particularly because the State has never even argued nondiscriminatory means to achieve its interests are unavailable.

C. Respondents' Efforts To Diminish The Split Regarding *Pike* Are Ineffective

Contrary to respondents' assertion (Br. in Opp. 14-20), the different approaches taken by the circuits to determine